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Supreme Court, U.S.
FILED

001907 JUN 20 2001

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

FRANCIS A. AFFRONTI, ANTHONY F. BONADIO, JOAN S. KOHOUT, Estate of LEONARD E. MAAS, MICHAEL J. MILLER, ANTHONY J. SCIOLINO and CHARLES L. WILLIS,
Petitioners,

v.

JONATHAN LIPPMAN, Chief Administrator of the Courts of the State of New York; H. CARL McCALL, as the Comptroller of the State of New York; and the STATE OF NEW YORK,
Respondents.

On Petition For Writ of Certiorari To The New York State Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the compensation scheme for county level Judges set forth in New York State's Judiciary Law §§221-d, 221-e and 221-f advance any legitimate state interest so as to satisfy the Fourteenth Amendment?

2. Is New York State's salary structure for Judges serving in Family Court, County Court and Surrogate's Court so totally irrational and arbitrary that it should be stricken down in its entirety?

LIST OF PARTIES

The parties to the proceedings are: FRANCIS A. AFFRONTI, ANTHONY F. BONADIO, JOAN S. KOHOUT, MONA MAAS, as Voluntary Administrator of the Estate of LEONARD E. MAAS, MICHAEL J. MILLER, ANTHONY J. SCIOLINO, CHARLES L. WILLIS, JONATHAN LIPPMAN, as the Administrative Judge and Chief Administrator of the Courts of the State of New York and as the representative of the Administrative Board of the Judicial Conference of the State of New York; H. CARL McCALL, as the Comptroller of the State of New York; and the STATE OF NEW YORK.

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REFERENCE TO LOWER COURT DECISIONS AND JURISDICTIONAL STATEMENT

The date of the entry of judgment by the New York Court of Appeals was March 22, 2001. This petition for a writ of certiorari is filed within the 90 day jurisdictional period as provided by Supreme Court Rule 13. Supreme Court jurisdiction arises under Title 28 U.S.C. § 1257 in petitions for writ of certiorari from the final judgments or decrees rendered by the highest court of a State in which a decision could be had, where the validity of a State statute is drawn into question on the ground of its being repugnant to the Constitution of the United States.

I

STATEMENT OF THE CASE

This case will determine whether elected state court judges, employed on a full time basis by the State of New York, are entitled to the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. Those rights have been denied them by the legislative branch of government in New York and, most recently, by the highest court in the State.

Petitioners challenge the constitutionality of New York State's haphazard and irrational statutory compensation scheme for all county level Judges. Strange as it may seem, the Judges of New York's County, Family and Surrogate's Courts are compensated solely based upon the locale of their service, while Judges serving in other Courts are paid the same no matter where they serve. For example, Judges of the Family Court in Monroe County (Rochester) are paid more than some Family Court Judges in neighboring counties and less (often

far less) than Family Court Judges elsewhere in the State. The same anomalies exist for County Court and Surrogate's Court Judges throughout the State.

Is this system of compensation justified by differing conditions in these locales? By differences in caseload or population? By cost of living differentials? The answer is a resounding *NO*. Rather, the legislation enacting this discriminatory system represents a vestige of an earlier practice by local communities which were then responsible for establishing and paying compensation to Judges of these Courts. Although the legislation was condemned nearly 20 years ago by New York's highest court as lacking in any rational basis, and despite the entreaties of numerous commissions, Chief Judges and Court Administrators, New York's Legislature is still unmoved. *Davis v. Rosenblatt*, 159 AD2d 163 (3rd Dept. 1990), *appeal dismissed* 77 NY2d 823.

Until recently, the New York Court of Appeals appeared sympathetic to the cause of these Judges, having sustained equal protection challenges to this statutory scheme on several occasions since 1982. The decision in the instant case, however, following on the heels of a spate of recent adverse decisions rendered by the Court of Appeals, demonstrates that New York's highest court has done a complete about face, turning its back on these litigants and leaving their fate in the hands of an unresponsive and recalcitrant Legislature.

Petitioners are current and former Monroe County Family Court Judges who Petition this Court not only on their own behalf, but also on behalf of the hundreds of other Family Court, County Court and Surrogate's Court Judges whose compensation is less than that paid to their colleagues on the same Courts sitting in other parts of the State.

Petitioners brought this action in New York State Supreme Court seeking a declaratory judgment that the disparity between their salaries and the salaries paid to Family Court Judges in Suffolk, Putnam and Sullivan Counties, all pursuant to New York's Judiciary Law §221-e, violates their rights to equal protection of the laws under the Federal and State Constitutions. U.S. Const, 14th Amend, §1; NY Const, Art I, §11. Moreover, a review of the statutory scheme demonstrates that there are numerous other Judges of the County level courts in New York who are being paid lower salaries than their counterparts in the very same courts in many counties of New York, all pursuant to Judiciary Law §§ 221-d, 221-e and 221-f. Therefore, Petitioners seeks a declaration from this Court that this statute is unconstitutional as a whole and as applied to Petitioners.

Petitioners' claims were tried before then Supreme Court Justice and now Appellate Division Associate Justice L. Paul Kehoe, whose written decision in favor of the Petitioners is found in the Appendix. (App., *infra*, 18a-31a) At trial, Petitioners proved that the jurisdiction, practice and procedure of the Family Court in the four counties in question were identical. They also proved that their duties, responsibilities and caseloads were the same. In other words, for equal protection purposes, they established at trial, to the satisfaction of the trier of the facts (who also served as Administrative Judge for the Judicial District encompassing Monroe County), that they were similarly situated with their brethren in Sullivan, Suffolk and Putnam Counties.

At trial, the Respondents State of New York and the Comptroller of the State of New York (hereinafter, the "State Defendants") never even attempted to justify the pay differential among Family Court Judges in Monroe, Putnam and Sullivan Counties. As for Suffolk County, they attempted

but utterly failed at trial to establish a rational basis for the challenged pay disparity. With respect to Suffolk County alone, the State Defendants offered into evidence a series of data which purported to show that the cost of living was higher in Suffolk County than Monroe County. That evidence was rejected by the trial court as useless, since there was no direct comparisons of cost of living between Monroe County and Suffolk County set forth in these data. The State Defendants also offered the testimony of an expert economist to support the Suffolk pay differential, which testimony was also rejected by the trial court as "essentially worthless." (App., *infra*, 27a)

Therefore, in his Order and Judgment of August 7, 1998 (App., *infra*, 14a-17a), Justice Kehoe ruled that Petitioners had been denied equal protection of the laws with respect to the salary disparity between Petitioners and the Family Court Judges in Putnam and Sullivan Counties since October 1, 1978 and with respect to the salary disparity between Petitioners and the Family Court Judges in Suffolk County since January 1, 1992. The trial court thus ordered the Respondents to pay Petitioners back pay with pre-judgment interest at New York's statutory rate and ordered the Respondents to pay to Petitioners salaries equal to those of Family Court Judges in Suffolk County, the highest of the three contested counties, thenceforth.

Respondents appealed to the Appellate Division, Fourth Department, which issued its Order and Memorandum Decision on October 1, 1999. (App., *infra*, 8a-13a). In its decision, the Appellate Division, relying on recent Court of Appeals precedent discussed below, reversed the award of pay parity with Petitioners' counterparts in Suffolk and Putnam Counties, but sustained the award of pay parity with Sullivan

County. In addition, the Appellate Division reversed the award of pre-judgment interest.

The New York Court of Appeals granted motions by both parties in this case for leave to appeal to that Court. *Affronti v. Crosson*, 95 NY2d 876 (2000). On March 22, 2001, the Court of Appeals dismissed all of Petitioners' claims and granted costs to the Respondents. (App., *infra*, 1a-7a) In its decision, at the urging of the State Defendants, the Court of Appeals agreed to take judicial notice, for the first time on appeal, of a *single statistic* obtained from the 1990 U.S. Census, referenced by the State Defendants only in their appellate brief, as justification for its conclusion that cost of living served as a "rational basis" for the pay disparity that had been enacted in 1976, became effective in 1977 and was perpetuated in every judicial pay adjustment act thereafter.

It could not be more obvious that, after two decades of judicial pay parity litigation [see, e.g., *Nelson v. Lippman*, 273 AD 740 (3rd Dept. 2000), dismissed *sua sponte* on appeal, 95 NY2d ___ (2001); *Henry v. Milonas*, 91 NY2d 264 (1998); *D'Amico v. Crosson*, 93 NY2d 29 (1999); *Barr v. Crosson*, 95 NY2d 164 (2000); *Weissman v. Evans*, 56 NY2d 458 (1982); *Cass v. State of New York*, 58 NY2d 460 (1983); *Barth v. Crosson*, 199 AD2d 1050 (4th Dept. 1993); *Burke v. Crosson*, 191 AD2d 997, *rev'd* and *remt'd* 85 NY2d 10; *Cheeseman v. Bellacosa*, 130 AD2d 920 (2d Dept. 1987); *Davis v. Rosenblatt, supra*; *Deutsch v. Crosson*, 171 AD2d 837 (2d Dept. 1991), *lv denied* 78 NY2d 857; *Dickinson v. Crosson*, 219 AD2d 50 (3d Dept. 1996); *Kendall v. Evans*, 126 AD2d 703 (2d Dept. 1988), *aff'd* 72 NY2d 963; *Killeen v. Crosson*, 218 AD2d 217 (4th Dept. 1996); *Nicolai v. Crosson*, 214 AD2d 714 (2d Dept. 1995), *appeal dismissed* 87 NY2d 896; *Weissman v. Bellacosa*, 129 AD2d 189 (2d Dept. 1987); *Wilson v. Crosson*, 222 AD2d 1085 (4th Dept. 1995)], the New York State Court of Appeals has grown weary of such cases. Its decision

in this case stands for the proposition that *any* evidence, no matter how flimsy, no matter when or how presented by the State, and whether or not based in reality, will defeat equal protection claims such as this against the State of New York from now on. Such a ruling cries out for review by the nation's highest tribunal.

The Kafkaesque Statutory Scheme

Prior to April 1, 1977, the salaries of Judges in the Family Courts, County Courts and Surrogates' Courts of the State of New York were established by local law in the communities in which the Judges served. Effective April 1, 1977, pursuant to the Unified Court Budget Act passed in 1976 (the "Act"), Family Court Judges, as well as Judges of all other courts of record, became State employees within the Unified Court System and their salaries were set by State law. Judiciary Law §39[6], as added by L. 1976, Ch. 966, §2; *Weissman v. Evans, supra.*

When the State initially established compensation throughout the State for Judges of courts of coordinate jurisdiction, rather than identifying a legitimate basis for differences in salary, the New York Legislature merely preserved disparities which had originated within each locality. *Weissman v. Evans, supra,* at p. 464. Such disparities resulted from local legislative decisions which were made solely on the basis of local political and fiscal concerns. *Davis v. Rosenblatt, supra.* These disparities have now been perpetuated by the State over the last twenty-four years irrespective of any local cost of living differences or fluctuations. As the Court of Appeals stated in the seminal case of *Weissman v. Evans, supra,* at pages 462-463:

> Thus, no attempt was then made actually to eliminate discrepant financial treatment attributable solely to local government discretion and funding, precisely the kind of nonuniformity it was the avowed purpose of the act to remove... (W)hen, by passing section 221-f of the Judiciary Law (L 1979, ch 55), the Legislature finally did get around to establishing its own salary scales...it still chose to maintain rather than eliminate the disparity. (Footnote omitted)

The Court continued at page 464:

> In fine, if anything, unless ancient rather than recent history is resorted to, a study of the past proclaims the proposition that the State has for a considerable number of years come to view differential treatment within a given court level as an irrational rather than a rational way to further the public interest.

Ignoring local conditions such as population, cost of living or caseload, the New York Legislature has consistently enacted legislation establishing uniform pay for all Supreme Court Justices in New York irrespective of the location of service of those Judges. Similarly, Appellate Division Justices are compensated the same, whether their appointment is to serve in the western, northern or southern part of the State. Finally, Court of Claims Judges who hear money damage claims against the State of New York all earn the same incomes regardless of the situs of their service. Judiciary Law §§221-a, 221-b and 221-c.

Yet county level Judges of the County, Family and Surrogate's Courts find themselves subject to an array of pay differentials completely detached from any rhyme or reason. For instance, there are 7 different pay tiers for County Court Judges, currently ranging from $119,800 annually to $136,700 all depending upon which of the 57 counties the Judges are elected to serve in. There are 6 different pay rates for Surrogate's Court Judges also encompassing the same range of pay, for the 30 counties having Surrogate's Courts. As for Family Court, there are 4 separate pay rates for Judges in those 33 counties with elected Family Court Judges. See, Judiciary Law §§ 221-d, 221-e and 221-f and the statutory predecessors thereof.

A closer examination of these pay scales shows that there is absolutely no uniformity among these rates. The utter irrationality of the entire pay system is best illustrated by a review of the salaries paid to the county level Judges in the five upstate New York counties of Albany, Broome (Binghamton), Erie (Buffalo), Monroe (Rochester) and Onondaga (Syracuse). If cost of living was to provide the "rational basis" for the pay differentials, one would think that Judges in those counties with a supposed higher cost of living would uniformly be paid more than their counterparts in the same Court elsewhere in the State, no matter if they served in County, Family or Surrogate's Court. Yet cost of living is clearly not a basis for pay differentials since the State has ignored cost of living in setting up its pay scales.

For example, the County Court Judges in Albany County are paid more than the Family Court and Surrogate's Court Judges. In Broome County, however, it is the Family Court Judges who get the highest pay among the three county level courts; in Erie County and in Onondaga County it is the Surrogate's Court Judges who get the highest pay. Even more

puzzling, in Monroe County, Judges of all three Courts are paid the same.

Looking at it another way, how is it that the Erie County Family Court Judges earn more than their Albany counterparts, while County Court Judges in Erie County earn less than their Albany counterparts? These illustrations demonstrate that neither cost of living, caseload, population nor jurisdiction serve as predicates for judicial salaries in these counties. The only possible explanation for these anomalies is the Legislature's failure to address the previously existing discrepancies created by local governments.

Nor can the State of New York point to practices in other jurisdictions to support its indefensible pay scales. The National Center for State Courts regularly gathers information on the salaries of state court Judges. In 2000, it published its Survey of Judicial Salaries which reveals that, of the 50 states, only New York, Alaska, Pennsylvania and Mississippi have State mandated compensation schemes for their full-time Judges where Judges within the same Courts are paid unequally. Of those States, only Alaska and New York base salary differentials on cost of living, and Alaska's system is uniformly applied with a degree of uniformity absent in New York. (Alaska Statutes §§22.05.140 and 22.35.010)

In light of these anomalies, it is not surprising that numerous judicial organizations have voiced support for this constitutional challenge to New York's entire compensation system for county level Judges. Associations of County Court, Family Court and Surrogate's Court Judges, the membership of which includes many Judges who earn amounts far greater than their colleagues elsewhere in the State, all agree that New

York State's judicial pay practices are an affront on the constitution and are manifestly unjust. (See App., *infra*, 38a-43a)

The Monroe County Disparities at Issue

Since 1978, Monroe County Family Court Judges have consistently received lower salaries than their counterparts in Suffolk, Putnam and Sullivan Counties. The salary disparities that have been prescribed by Judiciary Law §221-e from 1978 through 1999 are set forth in the Appendix. (App., *infra*, 37a)

The Court of Appeals' Recent About Face

Throughout the history of New York judicial pay parity cases dating from the early 1980's, the New York Legislature has continually perpetuated its original salary scheme, despite entreaties from varied and successive Chief Administrators of the Courts, from a special commission, and from the former Chief Judge of the Court of Appeals that all courts of co-equal jurisdiction should have equal salaries. *Davis v. Rosenblatt, supra*, at pp. 169-170. Although compensation for New York's county level Judges has increased over time, the discrepant treatment accorded Judges in certain counties has continued unabated, as a result of lock-step adjustments utilizing uniform percentage rates. L. 1984, Ch. 986, §6; L. 1987, Ch. 263, §7; L. 1993, Ch. 60, §32; L. 1998, Ch. 630, §1.

In the nearly twenty years following its decision in *Weissman v. Evans, supra*, the Court of Appeals has repeatedly sustained judicial pay awards founded upon claims of constitutional infirmity. See, *Kendall v. Evans, supra; Davis v. Rosenblatt, supra; Deutsch v. Crosson, supra.* Even as late as 1995, in *Burke v. Crosson, supra*, the Court seemed receptive to pay parity challenges, announcing that in such cases, "[t]he correctness of the Supreme Court's determination depends, at

least in part, on an analysis of the legal significance of the detailed facts set forth in the parties' submissions. It also rests on an understanding of regional economic conditions and local judicial practices." *Burke v. Crosson, supra,* at pp. 18, 19. In other words, plaintiffs in such cases were invited by the Court of Appeals to develop a complete record showing that such factors as cost of living, population and caseload did not justify any pay disparity.

However, starting in 1998, the Court announced a new, more strident approach toward these cases. No longer were the pay disparities regarded by the Court as impermissible vestiges of an abandoned system of local control of judicial offices. Ignoring the lock-step increases enacted by the Legislature since 1979 in clear defiance of the Court of Appeals holding in *Weissman v. Evans, supra,* in a remarkable reversal of form the Court declared that a rational basis has existed for these disparities, a basis grounded in alleged cost of living differentials supposedly evidenced by flimsy statistics proffered by the State Defendants. This despite the fact that the Court well knew, by its very own earlier pronouncements, that cost of living had nothing to do with the establishment and perpetuation of obviously irrational pay differentials.

Thus, in *Henry v. Milonas, supra, D'Amico v. Crosson, supra* and *Barr v. Crosson, supra,* the Court of Appeals reversed lower court awards of pay parity to Judges in Ontario, Erie and Monroe Counties respectively for county level Judges in those counties. Citing statistical evidence submitted by the State Defendants in each of those cases, the Court deemed such evidence sufficient to meet the constitutional requirement that there be a "rational relationship between the disparity of treatment and any legitimate governmental purpose (see, *Heller v. Doe,* 509 US 312, 320)." *D'Amico v. Crosson, supra,* at p. 32.

While that proof was never offered in this case and the evidence judicially noticed by the Court of Appeals is demonstrably false and unreliable, more important is the principle that even in these prior cases, the evidence offered by the State Defendants was merely pretextual, a fact well known to all parties and the Court of Appeals. No legislative history exists in this case which would show why the Legislature chose to retain rather than eliminate the pay disparities created by local governments at the time county level Judges were employees of the counties and not the State. The New York Legislature has never conducted a comprehensive review and revision of county level Judges' compensation since the time of its initial decision to merely perpetuate salary differentials created by the previous employer localities and its decision to ignore entreaties from court administrators that the disparities should be eliminated.

Indeed, the Court's new approach smacks of results oriented jurisprudence when it declares that the salary scheme, found to be lacking in a rational basis in 1982 (*Weissman v. Evans, supra*) and remaining unchanged for the next two decades, somehow now passes constitutional muster.

Petitioners Established that they were Similarly Situated for Equal Protection Purposes

In judicial pay parity cases such as this, the factors to be applied in determining whether a rational basis exists for such disparities include a comparison of the jurisdiction, practice and procedures in the comparator courts; the respective functions, duties and responsibilities of their Judges and their caseloads. *Weissman v. Evans, supra.* Other factors which may provide a rational basis for salary disparities include statewide differences in population and cost of living differences. *Cass v. State of New York, supra.*

A. Jurisdiction, Functions and Duties

By statute, the jurisdiction, practices and procedure of the Monroe County Family Court and the functions, duties and responsibilities of Petitioners are substantially the same as those of Family Court Judges in Suffolk, Putnam and Sullivan Counties. Family Court Act, Art. 1. County Court Judges in Putnam County "act and discharge the duties of judge of the family court." Family Court Act §13(b).

The State Defendants have never claimed that there are differences in the jurisdiction, functions and duties of the Judges of the various courts, although the State Defendants do assert that there is such a difference with respect to the Judges in Putnam County, citing the Court of Appeals holding in *Henry v. Milonas, supra.* Except as to Putnam County, there seems to be no dispute that Petitioners satisfied their burden of establishing that they are similarly situated to the Family Court Judges in Sullivan and Suffolk Counties for equal protection purposes.

B. Caseload and Population

The State Defendants have never maintained that the disparities found unconstitutional by the Lower Court are justified by reason of differences in caseload or population. It is undisputed that Family Court Judges in Monroe County have had a *greater* per judge caseload than their counterparts in Suffolk County since 1992, in Putnam County since at least 1986, and a substantially equal or greater caseload than their peers in Sullivan County since 1986. (App., *infra,* 32a-33a) Furthermore, according to the 1990 Census of the Population, the Monroe County Family Court serves a higher population per judge than the Family Courts in Suffolk, Putnam and Sullivan Counties.

C. Economic Factors

1. Opportunity Cost

Anticipating that the State Defendants would attempt to raise the pretext of cost of living as a basis for the disparities in question, Petitioners offered evidence at trial to demonstrate the absence of any such basis. Petitioners proffered the expert opinion of an economist that there are no official cost of living indices which would allow a direct comparison of the cost of living in the Counties of Monroe, Sullivan, Suffolk and Putnam. In other words, there are no reliable statistics upon which the Legislature could base a decision to compensate Monroe County Family Court Judges less than their counterparts in other counties.

According to Petitioners' expert, the relative earnings of attorneys in the counties in question is the only relevant economic consideration in establishing compensation for judges. This analysis is derived from the basic economic principle of "opportunity cost," defined as "what is foregone, what you miss when you make one choice and you could have made an alternative."

The recruitment and retention of quality judges would naturally serve as the sole economic objective in establishing different compensation rates for judges performing the same functions in the same courts. Under the doctrine of opportunity cost, the State should pay higher incomes to attorneys who become judges in counties where attorneys make more money than in other counties. Petitioners offered evidence at trial to show that Monroe County lawyers do as well or better financially than their counterparts in the three comparator counties.

Average Income of Attorneys Forty Years and Older

	Monroe	Suffolk	Putnam	Sullivan
1990	$72,470	$66,337	$63,144	$58,735
1995	$87,000	$87,000	$72,000	$53,000

2. **Actual Cost of Housing**

At trial, the State Defendants submitted no evidence of relative housing costs in the four counties involved in this case. However, Petitioners themselves offered evidence of housing costs by supplying expert testimony and documentary evidence showing that the actual sales prices of single-family homes in Monroe were consistently higher than in Sullivan County. Petitioners established that in 1992 the average selling price of a single-family home was 23 percent greater in Monroe County than in Sullivan County, in 1993 it was 19 percent greater, and in 1994 it was 40.4 percent greater. Petitioners also established that relative housing costs as of the time of trial in October 1997 were greater in Monroe County than in Sullivan County.

For their part, the State Defendants conceded at trial that they had performed no analysis of any cost of housing differential among the four counties. As earlier stated, the data that was offered by the State Defendants, consisting of data gathered to assist employers transferring employees from one locale to another, was deemed worthless by the trial court.

3. **The Suspect 1990 Census Data a/k/a the Pretext**

The record in this case does not contain a copy of the material which the State Defendants asked the Court of

Appeals to judicially notice and which the Court seized upon to defeat Petitioners' claims. Such evidence is absent from the record because the State Defendants never supplied it to any Court in this case.

The data in question is found in Table I-5 of the New York State Statistical Yearbook (21st rev ed; the "Yearbook") and is reproduced in part in the Appendix. (App., *infra*, 36a) The single statistic on which the State Defendants rely in their attempt to posit a rational basis for the pay differential between Monroe County Family Court Judges and those in Sullivan County is as follows:

> **In 1990, according to the United States Census Bureau, the "Median Value" of Owner-Occupied housing units was $93,400 for Sullivan County and $90,700 for Monroe County.**

Since the record in this case is barren of any reference to this statistic, other than mention in the appellate briefs of the State Defendants, the record also reflects no attempt by the Petitioners to demonstrate the inherent unreliability of the data in question. Indeed, the Appellate Division rejected out of hand the State Defendants' attempt to refer to material outside the record since, *inter alia*, that Court was never formally requested to take judicial notice of the material. Thus, the Petitioners were understandably aghast at the decision of the Court of Appeals not only to take judicial notice of the census data, but also to completely dismiss Petitioners' claims on such a thin reed.

An examination of this single statistic demonstrates beyond cavil the lengths to which the Court of Appeals will now go to chill the continued prosecution of these cases in

New York. First, as previously noted, the statistic is contained in the Yearbook, a document containing hundreds of pages of statistics gathered from numerous sources, including the U. S. Census Bureau. From that compilation, the State Defendants chose only one statistic to ask the Court of Appeals to judicially notice. This is not surprising in light of the remaining statistics contained in the same compilation which completely disprove the position taken by the State Defendants.

For example, in the same publication may be found tables showing *actual* sales prices of homes sold in Monroe and Sullivan Counties for the years 1987 through 1991. According to New York State Board of Equalization and Assessment, a State Agency created pursuant to Real Property Tax Law §200, the median *selling prices* of homes in Monroe and Sullivan Counties were as follows:

	1/87	1/88	1/89	1/90	1/91[1]
Monroe	74,900	79,000	83,000	84,500	83,000
Sullivan	55,000	70,000	80,000	82,000	75,000

Given these statistics, it is no wonder that the State Defendants asked the Court of Appeals to judicially notice only one statistic for the year 1990 out of the entire compilation of data contained in the Yearbook.

Since actual sales over these years show that the housing values in Monroe County were consistently higher than in Sullivan County, what did the Court of Appeals judicially notice in this case as a reliable statistic? The data

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[1] Dates given are the midpoints of the years in which the sales occurred.

denominated "Median Value" as set forth in Table I-5 of the Yearbook actually represents values "as specified by owner." In other words, when the Census Bureau asked Sullivan County and Monroe County homeowners the value of their homes in the year 1990, the Sullivan County homeowners *thought* their homes were worth more than Monroe County homeowners thought their homes were worth. That is, homeowner perception of value was all that was represented in that statistic. By contrast, actual sales figures presented at trial by Petitioners and contained in the same Yearbook relied upon by the State Defendants showed that housing costs in Sullivan County were lower for the years 1987 through 1991 than in Monroe County. Rather than establish that the cost of housing, and hence the cost of living was greater in Sullivan County than in Monroe County for the year 1990, the Yearbook, taken as a whole, showed just the opposite.

While the nature of the data was explained to the Court of Appeals at oral argument, the Court nevertheless chose to accept an erroneous statistic as proof of a fact which was clearly untrue. The disingenuous nature of the State Defendants' tactics seemed of no consequence to a Court which had another agenda in mind, that is to squelch all similar cases. No wonder counsel for the State Defendants was questioned at oral argument as to the number of similar judicial pay parity cases now pending.

As previously mentioned, the decision by the Court of Appeals to rely on the single statistic proffered by the State Defendants means that a pay disparity created by local governments prior to 1976, and continued in effect by the State every year since, was deemed by the Court to be justified by an alleged higher cost of living in Sullivan County in 1990, *14 years later*. To make matters worse, the equivalent statistic of "Median Values" set forth in Table I-5 of the 1980 version of

the Yearbook (App., *infra*, 35a), only four years after the statute was passed, showed that the Median Values of Owner Occupied housing units in 1980 for Sullivan County was $7,000 less than that for Monroe County for the same period! Conveniently, the State Defendants neglected to tell the Court of Appeals this fact.

II

ARGUMENT

POINT I

NEW YORK'S JUDICIARY LAW §221 (d-f) IS UNCONSTITUTIONAL BECAUSE IT BEARS NO RATIONAL RELATIONSHIP TO ANY OBJECTIVES WHICH OSTENSIBLY MOTIVATED THE LEGISLATION

The Equal Protection Clause of the Fourteenth Amendment, §1, requires that no State "deny to any person within its jurisdiction the equal protection of the laws." While the Constitution does not proscribe governmental classifications, according to this Court's decision in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), it "simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *F. R. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Equal protection jurisprudence has developed a three-tiered approach to examine legislative classifications. *Skinner v. State of Okl. ex rel Williamson*, 316 U.S. 535 (1942); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Craig v. Boren*, 429 U.S. 190 (1976); *Clements v.*

Fashing, 457 U.S. 957 (1982); *Reed v. Campbell*, 476 U.S. 852 (1986); *Nordlinger v. Hahn, supra; Heller v. Doe*, 509 U.S. 312 (1993); *Romer v. Evans*, 517 U.S. 620 (1996). "Strict scrutiny" is applied to suspect classifications and fundamental rights and this Court has historically rejected any legislative classification that is not necessary to fulfill a compelling or overriding government objective. For heightened or intermediate scrutiny, legislation will not survive unless the government can demonstrate that the classification is substantially related to an important societal interest.

Petitioners acknowledge that the third tier of scrutiny, the "rational relationship" or "rational basis" test applies to this case. Under this standard, challenged legislation is subjected to the least amount of judicial scrutiny. Such legislation will survive constitutional challenge so long as the classification is reasonably related to a legitimate government interest or objective. The rational relationship test permits the legislature to employ any classification that is conceivably or arguably related to a government interest that does not infringe upon a specific constitutional right. *Nordlinger v. Hahn, supra; Heller v. Doe, supra; Romer v. Evans, supra.*

According to this test, State legislation which discriminates among individuals who are similarly situated will be sustained provided the legislation is not completely arbitrary and bears some rational relationship to the objectives sought to be accomplished by the legislation. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). As stated in *Romer v. Evans, supra,* at p. 632, "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be obtained."

Where, as here, the discrimination is geographically based, to survive an equal protection challenge, a state must demonstrate "that the classification is neither capricious nor arbitrary but rests upon some reasonable consideration of difference or policy." *Levy v. Parker*, 346 F.Supp. 897 (E.D. La.), *aff'd* 411 U.S. 978 (1972). See also, *State Board of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527 (1931). State statutes imposing territorial distinctions without a rational basis are invalid. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gordon v. Lance*, 403 U.S. 1 (1970). Therefore, geographic distinctions must rest on "some ground of difference having a fair and substantial relation to the object of the legislation." *Manes v. Goldin*, 400 F. Supp. 23, 29 (E.D.N.Y.), *aff'd* 423 U.S. 1068 (1976).

What is the object of the legislation in question? Unfortunately, there is no record elucidating the legislative decision in 1979 to leave intact the salary differentials extant when the Unified Court Budget Act was passed in 1976 and became effective April 1, 1977. Yet the legislative history of the Act itself shows that the Legislature regarded the pre-existing division of responsibility for funding the courts as antithetical to the economical and efficient management of the court system. L. 1976, Ch. 966. The avowed purpose of that legislation was to eliminate inefficiencies resulting from the divided funding which, according to the Legislature, "blurs responsibility and accountability for an effective court system and makes the operation of each of the state courts dependent upon varying fiscal capabilities of individual local governments." L. 1976, Ch. 966, §1.

In 1979, §221 of the Judiciary Law was enacted to further implement the Act. §221-d provided for salaries for the Judges of all County, Family and Surrogate's Courts. Later, §221-d was replaced with §221-d, §221-e and §221-f, setting forth salaries for Judges of the County, Family and

Surrogate's Courts respectively. When it passed Chapter 55 of the Sessions Laws in 1979, the Legislature perpetuated the very same salary categories which were in existence in 1976 at the time the Act was passed. However, it is important to note that the Legislature also directed the Chief Administrator of the Courts to investigate "whether unreasonable disparity exists in the compensation of judges of courts of the same rank in different parts of the state." L. 1979, Ch. 55, §4. The chief administrator was required to report his findings to the Legislature, the Governor and the Chief Judge of the Court of Appeals and to recommend the elimination of any unreasonable disparities in pay. When Judge Herbert Evans, then Chief Administrator of the Courts, submitted his report to the Legislature on December 1, 1979, he recommended that the continuation of the disparities in question was "neither necessary, desirable nor equitable." The Legislature turned a deaf ear. No action has been taken on Judge Evans' recommendation for the last twenty-one years.

Manifestly, there is no rational relationship between the Act's stated legislative objective to eliminate the inefficiencies in the prior system and the perpetuation of unequal salaries for county level Judges that were earlier established by local governments. Nor is there any other legitimate objective that may be gleaned from the legislative history.

While a legitimate purpose may be inferred even in the absence of a legislative articulation, Supreme Court review requires that the objective "may reasonably have been the purpose and policy" of the legislation. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S.522, 528-529 (1959). See also, *Schweiker v. Wilson*, 450 U.S. 221 (1981). Otherwise, an entirely irrational, arbitrary or even illegitimate purpose might go unremedied.

For example, it would be clearly illegitimate and unconstitutional for New York's Legislature to refuse to equalize judicial salaries simply because the Legislature disapproved of the decisions rendered by the Judges in counties receiving the disparate treatment. Similarly, these distinctions should be stricken if they are being perpetuated because legislators from the disfavored communities lack sufficient political capital to effect a change and to insure that the Judges from their communities receive fair compensation for their services.

Here the Court of Appeals improperly endorsed cost of living as the basis for the disparity it sustained, applying the very post hoc hypothesis denounced by Justice Powell in *Schweiker v. Wilson, supra.* In so doing, the Court ignored its own precedent in *Burke v. Crosson, supra,* that the correctness of the lower court decision depended upon a review of the detailed submissions by the parties and an understanding of regional economic conditions. In other words, in six short years, the Court of Appeals transformed its own judicial pay parity jurisprudence from a thorough analysis of the factual underpinnings of the disparities to a wholesale adoption of scant, questionable data offered by the State Defendants for the first time on appeal. The Court also ignored its own previous denunciation of the legislation as having no relation to the stated objective of improving efficiency in the court system.

As this Court has stated:

> True, even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation. *Heller v. Doe, supra,* at p. 322.

In this case, the absence of any articulated purpose in continuing salary disparities previously created by local governments, coupled with a legislative history showing a clear refusal to address the reasonableness of the perpetuated salaries, provides overwhelming evidence that the pay distinctions for county level Judges under §221 (e-f) of New York's Judiciary Law are not classifications designed to further any legitimate legislative objective. As such, they fail to satisfy the rational relationship test and must be declared unconstitutional.

POINT II

NEW YORK'S PAY DISTINCTIONS AMONG COUNTY LEVEL JUDGES ARE COMPLETELY IRRATIONAL AND TOTALLY ARBITRARY

Even were one to conclude that there was some nexus between the legislative objective behind Judiciary Law §221 (e-f) and the retention of previously established pay disparities, there is no doubt that the statute is totally illogical and inconsistent by reason of its lack of uniformity.

Where it is clear that the classification is inherently arbitrary in nature and effect, this Court will strike the legislation on that ground alone. Thus, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 452 (1982), Justice Blackman opined that the practice of the Illinois Fair Employment Practices Commission to dismiss complaints which the Commission itself failed to review within 120 days was beyond "the merely foolish" and was in fact arbitrary under the rational basis standard. Likewise, the failure of the New York Legislature to address and remedy the pay disparities inherited by the State in 1977 serves as an illustration of how best to retard public policy, in

derogation of the State's constitutional duty to extend the equal protection of its laws to its citizens.

In *Nordlinger v. Hahn, supra,* this Court articulated a three-pronged rule by which the rational basis test can be satisfied. First, there must be a plausible policy reason for the classification. Second, it must appear that the "legislative facts" on which the classification is apparently based "rationally may have been considered to be true by the governmental decision maker." Third, there must be a finding that the "relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn, supra,* at p. 11.

As set forth in Point I, there is no plausible policy reason for the perpetuation of salary differential established by local governments. In addition, there are no "legislative facts" on which the legislation is apparently based. Lastly, all of the evidence at trial and the entire legislative scheme demonstrate that, if there is any "goal" underlying the classification (Petitioners assert that there is none), its relationship to the classification is totally arbitrary and irrational.

Certainly, cost of living has not served as the rational basis for these classifications. Indeed, Judiciary Law §221 (e-f) is permeated with illustrations which demonstrate a deliberate disregard by the Legislature for the relative cost of living in differing communities. For example, pursuant to Judiciary Law §221-d and -e, County Court Judges and Family Court Judges in Monroe County receive the same salary. Yet, under the same statutes, County Court Judges in Albany County are paid more than Family Court Judges. Obviously, the cost of living within Albany County is no different for Family Court Judges than for County Court Judges, yet they are paid differently. The justification cannot be that the Legislature

decided to compensate County Court Judges more than Family Court Judges because that is not the rule elsewhere in the State.

Thus, if the State's rationale for salary disparities is cost of living, the statutory scheme is *prima facie* arbitrary because the alleged rationale is applied indiscriminately by the State. As previously noted, Justices of the Supreme Court, New York's Court of general jurisdiction, are paid equally, irrespective of the situs of their service. The same is true for Appellate Division Justices and Judges of New York's Court of Claims. Petitioners would certainly prefer that all county level Judges within the same Court be paid equally. That has been the preference of New York's Office of Court Administration for many years. *Davis v. Rosenblatt, supra.*

However, Petitioners recognize that the law does not necessarily mandate that all county level Judges be paid the same. Rather, pay differentials established by the State are constitutionally permitted *if* the distinctions are grounded in rationality and are not totally arbitrary, as here.

For example, geographic distinctions may be justified where established criteria, such as cost of living, population or caseload are uniformly applied. Indeed, the Judicial Salary Survey of the National Center for State Courts reveals that several states compensate their Judges based upon differences in population or caseload. In this case, however, such criteria are absent. New York State does not pretend that any rational criteria are applied, either over time or at any time. Indeed, to employ cost of living as a basis for adjusting salaries would require at least periodic review as economic conditions change.

Petitioners would be satisfied if the Legislature had simply adopted a cost of living differential to be applied in a

consistent manner (see, e.g., Alaska Statutes §§22.05.140 and 22.35.010) or some other rational way to distinguish county level Judges in one part of the State from others. The hodge-podge system sustained by the Court of Appeals simply falls far short of any rational standard and must be overturned.

CONCLUSION

THE JUDGMENT OF THE NEW YORK COURT OF APPEALS SHOULD BE REVERSED IN ITS ENTIRETY AND THE ORDER AND JUDGMENT OF THE LOWER COURT SHOULD BE REINSTATED IN FULL

In sum, the result obtained by Petitioners from New York's highest court had nothing to do with justice, fairness or constitutional protection. Rather, it was a means to an end; an attempt to end judicial pay parity litigation in New York for all time, irrespective of New York State's consistent and persistent violation of the rights of Petitioners and their county level judicial colleagues throughout the State to equal protection of the laws. This Court is now presented with the opportunity to end this invidious practice and to reinstate the rights of New York State Court Judges to be compensated in a non-discriminatory and rational manner.

Dated: June 15, 2001

Respectfully submitted,

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APPENDIX

STATE OF NEWYORK
COURT OF APPEALS

This opinion is uncorrected and subject to revision before publication in the New York Reports.

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4 No. 38
Honorable Francis A. Affronti,
et al.,
Appellants-Respondents,
v.
Matthew T. Crosson, as Chief
Administrator of Courts of State
of New York &c., et al.,
Respondents-Appellants.

OPINION

Robert J. Pearl, for appellants-respondents.
Frank K. Walsh, for respondents-appellants Regan & State New York.
John J. Sullivan, for respondent-appellant Chief Administrative Judge.

PER CURIAM:

Plaintiffs, current and former Monroe County Family Court Judges, challenge the constitutionality of Judiciary Law §§ 221-d and 221-e on the ground that the statutorily enacted pay disparities between the Family Court Judges of Monroe County and Judges serving in the Family Courts of Sullivan, Putnam and Suffolk Counties violate their rights to equal protection under the 14th Amendment of the Federal

Constitution and article I, § 11 of the State Constitution. Because a rational basis exists for the salary disparities, we hold that the challenged provisions do not violate equal protection.

In April 1992, plaintiffs commenced this action seeking declaratory, injunctive and monetary relief against defendants Matthew T. Crosson, then Chief Administrator of the Courts of New York, Edward Regan, then Comptroller of the State of New York, and the State of New York. Plaintiffs alleged that defendants violated their equal protection rights under the State and Federal Constitutions because, under Judiciary Law § 221-e, the statutory salaries of Sullivan and Suffolk County Family Court Judges were higher than plaintiffs' salaries and, under Judiciary Law § 221-d, the salaries of Putnam County Court Judges, who serve in a multi-bench capacity, including as Family Court Judges (see, Family Court Act § 131[b]), were also higher.

At trial, plaintiffs proffered evidence seeking to demonstrate a similarity -- in the functions, duties and responsibilities performed -- between themselves and Judges in the other counties, and that the population and caseload per Judge were substantially either equal or greater in Monroe County than in the comparator counties. Plaintiffs also sought to establish that the average cost of single-family homes in Monroe County was greater than in Sullivan County. Defendants countered with expert testimony and statistical data showing a cost of living differential between Monroe and Suffolk Counties only and, thereafter, the defense rested.

Supreme Court (1) declared that the salary disparities between plaintiffs and the Judges sitting in Family Court in Sullivan, Suffolk and Putnam Counties lacked a rational basis and violated plaintiffs' equal protection rights, (2) awarded

plaintiffs back pay with prejudgment interest and (3) directed defendants to raise plaintiffs' salaries to equal those of Family Court Judges in Suffolk County.

Upon defendants' appeal, the Appellate Division reversed as to the Putnam and Suffolk County salary differentials (see, 265 AD2d 817, 818). The court concluded that the Putnam County Court Judges, as multi-bench Judges, did not share a true unity of judicial interest with the plaintiff Family Court Judges due to distinctions in jurisdiction, authority, duties and caseloads. The court also concluded that plaintiffs failed to demonstrate that the costs of living in Monroe and Suffolk Counties are substantially similar and, thus, did not prove that no reasonably conceivable state of facts would support the salary disparity. With respect to the pay disparity between plaintiffs and the Sullivan County Family Court Judges, however, the court affirmed (see, id.). Defendants submitted to the Appellate Division 1990 U.S. Bureau of the Census data from the New York State Statistical Yearbook setting forth higher median home values in Sullivan County than Monroe County, similar to Yearbook data cited by this Court in finding a rational basis for other judicial salary disparities (see, Barr v Crosson, 95 NY2d 164, 170; D'Amico v Crosson, 93 NY2d 29, 32; Henry v Milonas, 91 NY2d 264, 269). Nonetheless, that court refused to consider the data on the ground that it was "presented for the first time in the brief of defendants * * * [and, thus] not properly before us" (265 AD2d, at 818). The court awarded plaintiffs back pay, but concluded that plaintiffs were not entitled to prejudgment interest.

We granted plaintiffs' motion and the State defendants' and Chief Administrator's cross motions for leave to appeal from the Appellate Division order.

We agree with the Appellate Division insofar as it declared that the salary disparities between plaintiffs and their counterparts in Putnam and Suffolk Counties are constitutional. As in Henry v Milonas (supra, at 269), the Putnam County Court Judges' multiple roles give rise to "distinctions in the jurisdiction, authority, duties and caseloads of [the Putnam County Court Judges] as 'multibench' Judges [and] preclude a determination of true unity of judicial interest in the compared posts and provide a rational basis for the statutory salary differentials." In addition, plaintiffs proffered no proof that the costs of living in Monroe and Suffolk County are comparable and, thus, failed to demonstrate a "true unity of * * * judicial interest * * * indistinguishable by separate geographic considerations" (id., at 268 [quoting Weissman v Evans, 56 NY2d 458, 463][internal quotation marks omitted][emphasis supplied]). Accordingly, plaintiffs did not meet their threshold burden of demonstrating that they and the Judges from Putnam and Suffolk Counties were similarly situated for equal protection analysis. However, we disagree with the holding of the courts below as to Sullivan County and conclude that a rational basis exists for the challenged disparity.

Where a governmental classification is not based on an inherently suspect characteristic and does not impermissibly interfere with the exercise of a fundamental right, it need only rationally further a legitimate state interest to be upheld as constitutional (see, Nordlinger v Kahn, 505 US 1, 10). Undisputably, the disparate judicial salary schedules in Judiciary Law §§ 221-d and 221-e do not involve suspect classes or fundamental rights and are therefore subject to rational basis review (see, e.g., D'Amico v Crosson, 93 NY2d, at 32, supra; Henry v Milonas, 91 NY2d, at 268, supra).

The rational basis standard of review is "'a paradigm of judicial restraint'" (Port Jefferson Health Care Facility v Wing, 94 NY2d 284, 290 [quoting Federal Communications Commn. v Beach Communications, 508 US 307, 314], cert denied _ US _, 120 S Ct 2744). On rational basis review, a statute will be upheld unless the disparate treatment is "so unrelated to the achievement of any combination of legitimate purposes that * * * [it is] irrational" (Kimel v Florida Bd. of Regents, 528 US 62, 84 [internal citations and quotation marks omitted]). Since the challenged statute is presumed to be valid, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it * * * whether or not the basis has a foundation in the record" (Heller v Doe, 509 US 312, 320-321 [quoted case and internal quotation marks omitted]). Thus, "'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker'" (Minnesota v Clover Leaf Creamery Co., 449 US 456, 464 [quoting Vance v Bradley, 440 US 93, 111]).

Indeed, courts may even hypothesize the Legislature's motivation or possible legitimate purpose (see, Port Jefferson Health Care Facility v Wing, 94 NY2d, at 291, supra). Thus, "the State has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data" (id. [quoted case and internal quotation marks omitted]).

Here, the State defendants submitted 1990 U.S. Census data from the 1996 New York State Statistical Yearbook (21st rev ed) demonstrating that median home values were approximately 3% higher in Sullivan County than in Monroe County -- $93,400 to $90,700. The salary of a Family Court

Judge in Sullivan County has been approximately 1% higher than plaintiffs' salaries since October 1987 and has never been more than 1.96% higher than plaintiffs' salaries (see, Judiciary Law §§ 221-d and 221-e). Therefore, the data illustrating the difference in median home values alone may provide a rational basis for the salary disparity (see, Henry v Milonas, 91 NY2d, at 269, supra), if such data is properly before us.

The census data from the State Statistical Yearbook, which, as noted above, we relied upon in Barr v Crosson (95 NY2d 164, supra), D'Amico v Crosson (93 NY2d 29, supra), and Henry v Milonas (91 NY2d 264, supra), is a proper subject of judicial notice because it is taken from public records (see, Matter of Siwek v Mahoney, 39 NY2d 159, 163 n 2; Mackston v State of New York, 126 AD2d 710, 711). Moreover, because this data reflects a legislative fact, as opposed to an evidentiary fact, its absence from the record does not prevent its consideration for the first time on appeal (see, Heller v Doe, 509 US, at 320-321, supra). As we explained in Port Jefferson Health Care Facility v Wing (94 NY2d, at 291, 294, supra), the data is not subject to dispute or courtroom factfinding; indeed, any "effort to induce this Court to utilize evidentiary facts to counteract arguable legislative assumptions [would violate] the rule that a legislative choice is not subject to courtroom fact-finding."

We thus conclude that the census data is properly before us and provides a rational basis for the challenged provisions. Plaintiffs have failed to satisfy their heavy burden of proving that no reasonably conceivable state of facts supports the salary disparity. Our conclusion renders academic those portions of the parties' appeal and cross appeals challenging the Fourth Department's denial of prejudgment interest and determination that the back pay claims were not time-barred.

Accordingly, the order of the Appellate Division should be modified, with costs to defendants, by granting judgment declaring that the salary disparity between the Family Court Judges in Monroe County and Sullivan County is constitutional and, as so modified, affirmed.

* * * * * * * * * * * * * * * * * * * *

Order modified, with costs to defendants, by granting judgment declaring that the salary disparity between the Family Court Judges in Monroe County and Sullivan County is constitutional and, as so modified, affirmed. Opinion Per Curiam. Judges Smith, Levine, Ciparick, Rosenblatt and Graffeo concur. Chief Judge Kaye and Judge Wesley took no part.

Decided March 22, 2001

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

1126

PRESENT: GREEN, J.P., LAWTON, PIGOTT, JR., SCUDDER AND BALIO, JJ.

CA 98-3742

HONORABLE FRANCIS A. AFFRONTI, HONORABLE ANTHONY F. BONADIO, HONORABLE JOAN S. KOHOUT, HONORABLE LEONARD E. MAAS, HONORABLE MICHAEL J. MILLER, HONORABLE ANTHONY J. SCIOLINO AND HONORABLE CHARLES L. WILLIS, PLAINTIFFS-RESPONDENTS,

V

MATTHEW T. CROSSON, AS CHIEF ADMINISTRATOR OF COURTS OF STATE OF NEW YORK AND AS REPRESENTATIVE OF ADMINISTRATIVE BOARD OF JUDICIAL CONFERENCE OF STATE OF NEW YORK, EDWARD V. REGAN, AS COMPTROLLER OF STATE OF NEW YORK, AND STATE OF NEW YORK, DEFENDANTS-APPELLANTS.

Matthew T. Crosson, as Chief Administrator of Courts of State of New York and as Representative of Administrative Board of Judicial Conference of State of New York, having appealed to this Court from the judgment (denominated order and judgment) of the Supreme Court, entered in the Monroe County Clerk's Office on August 14, 1998, and Edward V. Regan, as Comptroller of State of New York, and State of New York having appealed from said judgment, and said appeals having been argued by John J. Sullivan of counsel for defendant-appellant Matthew T. Crosson, as Chief Administrator of Courts of State of New York and as Representative of Administrative Board of Judicial Conference

of State of New York, Frank K. Walsh of counsel for defendants-appellants Edward V. Regan, as Comptroller of State of New York, and State of New York, Robert J. Pearl of counsel for plaintiffs-respondents, and due deliberation having been had thereon,

It is hereby ORDERED that the judgment so appealed from be and the same hereby is unanimously modified on the law by vacating those parts declaring that the salary disparities between plaintiffs and County Court Judges serving as Acting Family Court Judges in Putnam County and Family Court Judges in Suffolk County are unconstitutional, by granting judgment in favor of defendants as follows:

> It is ADJUDGED AND DECLARED that the salary disparities between plaintiffs and County Court Judges serving as Acting Family Court Judges in Putnam County and Family Court Judges in Suffolk County are constitutional,

by vacating those parts directing defendants to pay plaintiffs back pay, salaries and benefits equal to County Court Judges serving as Acting Family Court Judges in Putnam County and Family Court Judges in Suffolk County and by awarding plaintiffs prejudgment interest on the back pay award equal to the pay of Family Court Judges in Sullivan County and as modified the judgment is affirmed without costs.

Memorandum that is hereby made a part hereof.

Entered: October 1, 1999 CARL M. DARNALL, Clerk

SUPREME COURT }
APPELLATE DIVISION, }
Fourth Judicial Department, }
Clerk's Office, Rochester, N.Y. }

I, CARL M. DARNALL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this OCT 01 1999

s/Carl M. Darnall

Clerk.

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

(1126) CA 98-3742. (Monroe Co.) - HONORABLE FRANCIS A. AFFRONTI, HONORABLE ANTHONY F. BONADIO, HONORABLE JOAN S. KOHOUT, HONORABLE LEONARD E. MAAS, HONORABLE MICHAEL J. MILLER, HONORABLE ANTHONY J. SCIOLINO AND HONORABLE CHARLES L. WILLIS, PLAINTIFFS-RESPONDENTS, V MATTHEW T. CROSSON, AS CHIEF ADMINISTRATOR OF COURTS OF STATE OF NEW YORK AND AS REPRESENTATIVE OF ADMINISTRATIVE BOARD OF JUDICIAL CONFERENCE OF STATE OF NEW YORK, EDWARD V. REGAN, AS COMPTROLLER OF STATE OF NEW YORK, AND STATE OF NEW YORK, DEFENDANTS-APPELLANTS. - Judgment unanimously modified on the law and as modified affirmed without costs and judgment granted in accordance with the following Memorandum: Plaintiffs, present and former Judges of Monroe County Family Court, commenced this action seeking declaratory, injunctive and monetary relief to eliminate the disparity between their salaries and salaries paid to Family Court Judges in Sullivan and Suffolk Counties and County Court Judges serving as Acting Family Court Judges in Putnam County. Supreme Court erred in granting judgment to plaintiffs on the second cause of action, eliminating the disparity between their salaries and salaries paid to County Court Judges serving as Acting Family Court Judges in Putnam County. Distinctions in jurisdiction, authority, duties and caseloads between plaintiffs and Judges serving in a multibench capacity in Putnam County "preclude a determination of true unity of judicial interest in the compared posts and provide a rational basis for the statutory salary differentials" (*Henry v Milonas*, 91 NY2d 264, 269). The

court also erred in granting judgment to plaintiffs on that part of the fourth cause of action challenging the disparity between their salaries and salaries paid to Family Court Judges in Suffolk County. Plaintiffs failed to present proof that the costs of living in Monroe and Suffolk Counties are comparable and thereby failed to meet their "heavy burden of proving that there is no reasonably conceivable state of facts which rationally supports the distinction" in salaries (*D'Amico v Crosson*, 93 NY2d 29, 32). Plaintiffs met that burden with respect to their first cause of action, and the court properly granted judgment eliminating the disparity between plaintiffs' salaries and salaries paid to Family Court Judges in Sullivan County. Plaintiffs presented proof establishing that their duties and responsibilities are equivalent to those of Family Court Judges in Sullivan County and that caseloads per Judge, population, population per Judge and average housing costs are higher in Monroe County than in Sullivan County. Defendants failed to establish that a rational basis exists for the disparity in salaries, and the disparity therefore violates plaintiffs' right to equal protection of the laws (*see, Weissman v Evans*, 56 NY2d 458, 463; *Davis v Rosenblatt*, 159 AD2d 163, 171, *appeal dismissed* 77 NY2d 834, 79 NY2d 822, *lv denied* 79 NY2d 757). The data regarding median home values in Monroe, Sullivan, Suffolk and Putnam Counties, presented for the first time in the brief of defendants Edward V. Regan, as Comptroller of the State of New York, and the State of New York, are not properly before us (*see, Board of Educ. v Gootnick*, 49 NY2d 683, 687; *Broida v Bancroft*, 103 AD2d 88, 93).

We reject the contention that plaintiffs' claims for back pay in an amount equal to the pay of Family Court Judges in Sullivan County are time-barred (*see, Davis v Rosenblatt, supra*, at 172-173; *see also, Dickinson v. Crosson*, 219 AD2d 50, 52). We conclude, however, that plaintiffs are not entitled to prejudgment interest on the back pay award (*see, Barr v*

Crosson, ___ AD2d ___ [decided July 22, 1999]; *Davis v Rosenblatt, supra*, at 173).

We therefore modify the judgment by vacating those parts declaring that the salary disparities between plaintiffs and County Court Judges serving as Acting Family Court Judges in Putnam County and Family Court Judges in Suffolk County are unconstitutional, by granting judgment in favor of defendants declaring that the salary disparities between plaintiffs and County Court Judges serving as Acting Family Court Judges in Putnam County and Family Court Judges in Suffolk County are constitutional, by vacating those parts directing defendants to pay plaintiffs back pay, salaries and benefits equal to County Court Judges serving as Acting Family Court Judges in Putnam County and Family Court Judges in Suffolk County and by awarding plaintiffs prejudgment interest on the back pay award equal to the pay of Family Court Judges in Sullivan County. (Appeals from Judgment of Supreme Court, Monroe County, Kehoe, J. - Declaratory Judgment.) PRESENT: GREEN, J.P., LAWTON, PIGOTT, JR., SCUDDER AND BALIO, JJ. (Filed Oct. 1, 1999.)

At a Trial Term of the Supreme Court held in and for the County of Monroe at the Hall of Justice, Rochester, New York on the 6th day of October, 1997.

PRESENT: HON. L. PAUL KEHOE
Supreme Court Justice

STATE OF NEW YORK Index No. 96/2998
SUPREME COURT COUNTY OF MONROE

FRANCIS A. AFFRONTI, ANTHONY F. BONADIO, JOAN S. KOHOUT, LEONARD E. MAAS, MICHAEL J. MILLER, ANTHONY J. SCIOLINO and CHARLES L. WILLIS,

Plaintiffs,

-vs- ORDER AND JUDGMENT

MATTHEW CROSSON, as the Chief Administrator of the Courts of the State of New York and as the representative of the Administrative Board of the Judicial Conference of the State of New York; EDWARD V. REGAN, as the Comptroller of the State of New York; and the STATE OF NEW YORK,

Defendants.

Plaintiffs Francis A. Affronti, Anthony F. Bonadio, Joan S. Kohout, Leonard E. Maas, Michael J. Miller, Anthony J. Sciolino and Charles L. Willis, by their attorneys, the Law Offices of Pearl & Smith, having come before this Court for the

trial of this matter on October 6, 1997, and plaintiffs having appeared by their said attorneys (Robert J. Pearl, of csl.); defendants State of New York and the Comptroller of the State of New York, having appeared by Attorney General Dennis C. Vacco (William D. Lonergan, Esq., of csl.); and having no appearance on behalf of the Chief Administrator of the Courts,

NOW upon the trial of this matter held on October 6, 1997 and upon this Court's written decision dated June 30, 1998, it is hereby

ORDERED, DECLARED AND ADJUDGED, that the salary disparity between plaintiffs and Family Court Judges in Putnam and Sullivan Counties is, and has been, violative of plaintiffs' constitutional rights to equal protection of the law as lacking in any rational basis since October 1, 1978; and it is further

ORDERED, DECLARED AND ADJUDGED, that the salary disparity between plaintiffs and Family Court Judges in Suffolk County is, and has been, violative of plaintiffs' constitutional rights to equal protection of the law as lacking in any rational basis since January 1, 1992; and it is further

ORDERED, DECLARED, ADJUDGED AND DECREED, that the defendants are mandatorily enjoined to pay plaintiffs back pay equal to the pay of the higher of the salaries of Family Court Judges in Sullivan County or Family Court Judges in Putnam County, beginning from either October 1, 1978 or the dates of their commencement of service as Family Court Judges in Monroe County, whichever is later; and for back pay equal to the pay of Family Court Judges of Suffolk County, beginning from either January 1, 1992 or the dates of their commencement of service as Family Court

Judges in Monroe County, whichever is later, with interest at the statutory rate prescribed by CPLR 5004; and it is further

ORDERED, DECLARED, ADJUDGED AND DECREED, that defendants are directed henceforth to pay to plaintiffs salaries equal to those of Family Court Judges in Suffolk County; and it is further

ORDERED, DECLARED, ADJUDGED AND DECREED, that defendants shall make or cause to be made such pension base adjustments computed by defendant Comptroller of the State of New York, as is necessary to henceforth compensate plaintiffs and to provide fringe benefits to plaintiffs at the same rates as the Family Court Judges in Suffolk County; and it is further

ORDERED, DECLARED, ADJUDGED AND DECREED, that defendant Comptroller of the State of New York shall make or cause to be made such additional payments for plaintiffs' benefit into the appropriate pension fund as is necessary to reflect the pension base adjustments required by this Order and Judgment; and it is further

ORDERED, DECLARED, ADJUDGED AND DECREED that defendants shall make payments or contributions for plaintiffs' benefit for any other fringe benefits to reflect the increases in salary that have been adjudged and decreed to be due and owing hereunder; and it is further

ORDERED, DECLARED, ADJUDGED AND DECREED, that defendants shall pay pre-judgment interest at the statutory rate on the amount that each plaintiff was underpaid and that such interest for each year of underpayment shall accrue from the end of each calendar year during which each plaintiff was underpaid.

Signed at Rochester, New York
this 7 day of August, 1998.

s/L. Paul Kehoe
Hon. L. Paul Kehoe, J.S.C.

ENTER

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE
FRANCIS A. AFFRONTI, ANTHONY F. BONADIO, JOAN S. KOHOUT, LEONARD E. MAAS, MICHAEL J. MILLER, ANTHONY J. SCIOLINO and CHARLES L. WILLIS,

Plaintiffs,

vs. Index No. 96/2998

MATTHEW CROSSON, as the Chief Administrator of the Courts of the State of New York and as the representative of the Administrative Board of the Judicial Conference of the State of New York; EDWARD V. REGAN, as the Comptroller of the State of New York; and the STATE OF NEW YORK,

Defendants.

APPEARANCES:

PEARL & SMITH
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Attorney General of the State of New York
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DECISION

L. Paul Kehoe, J.

Plaintiffs are past and present Family Court Judges in Monroe County. They challenge the constitutionality of Judiciary Law §221-e on the ground that the statutorily-enacted pay disparity between the Family Court Judges of Monroe County and the Family Court Judges of Sullivan, Putnam and Suffolk Counties violates their right to equal protection of the law. The trial of this action was held before the Court on October 6, 1997.

Family Court Judges in Monroe County are currently paid $103,800 per year while Family Court Judges in Sullivan and Suffolk Counties are currently being paid $105,000 and $113,000 per year, respectively. There is no elected Family Court Judge in Putnam County. There, the elected County Court Judge acts and discharges the duties of a Family Court Judge pursuant to *Family Court Act*, §131(b). The annual salary of the County Court Judge in Putnam County is $108,600.00. Similar disparities in the compensation of plaintiffs and the judges of the comparator counties have existed during all periods for which redress is sought.

The Court of Appeals has recently summarized the test to be applied in equal protection cases in its decision *Henry v Milonas*, 91 NY2d 263 (1998) as follows:

> For equal protection purposes, classifications that do not target a suspect class or infringe upon a fundamental right must be upheld if the classification is rationally related to a legitimate State interest (*see, Cass v State of New York*, 58 NY2d 460, 463-464;

> *Matter of Tolub v Evans*, 58 NY2d 1, 8). While "a statutory scheme will not be struck down as violative of equal protection merely because it creates differences in geographic areas" (*Tolub*, supra), the geographic or territorial distinction must be supported by a rational basis (*Weissman v Evans*, 56 NY2d 458, 465-466). The party challenging the constitutionality of such a statute bears the heavy burden of demonstrating that no conceivable State interest rationally supports the distinction (*Trump v Chu*, 65 NY2d 20, 25, 28; *Maresca v Cuomo*, 64 NY2d 242, 250-251) (*Henry v Milonas*, supra at 267-268).

The factors to be considered in applying the rational basis test include a comparison of the jurisdiction, practice and procedures in the comparator courts; the respective functions, duties and responsibilities of their judge, and their caseloads (*see, Weissman v Evans*, 56 NY2d 458 [1982]). Other factors which may provide a rational basis for salary disparities include state-wide differences in population and cost of living differences (*see, Cass v State of New York*, 58 NY2d 460 [1983]). The fact that the comparator counties are all situated outside of the Fourth Department does not alone provide a rational basis for the pay disparities challenged in this action (*see, Killeen v Crosson*, 218 AD2d 217 [4th Dept., 1966]).

The traditional test for a denial of equal protection under State Law is "whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid State objective" (*Turner v Fouche*, 396 US 346, 362 [1970]). The test is applied by initially ascertaining both the basis of the classification involved and the governmental objective purportedly advanced by the classification. The classification is then compared to the objective to determine if the classification rests "upon some ground of difference having a fair and substantial relation" to the object for which it is proposed (*Reed v Reed*, 404 US 71 [1971]).

Subsequent to the trial in this action a decision was rendered in Supreme Court, Erie County, on the remand of *Killeen v Crosson*, supra. That decision holds that the disparity between the salaries paid to the *Killeen* plaintiffs, Family Court Judges serving Erie County, and the salaries paid to judges serving in Family court in Putnam and Suffolk Counties did not violate the plaintiffs' equal protection rights (*Killeen v Crosson*, Supreme Court, Erie County, Doyle, J., decided November 18, 1997). Defendants in their post-trial submissions argue that Justice Doyle's decision in *Killeen* is relevant to the disposition of this action. That argument is rejected. This Court's decision must rest upon an analysis of the legal significance of the facts proved at the trial of this action (*Burke v Crosson*, 85 NY2d 10 [1995]). The doctrines of stare decisis, res judicata and collateral estoppel do not preclude seemingly inconsistent decisions in cases involving the same or similar fact issues (*see, Killeen v Crosson*, supra, at 217). Thus a pay disparity between County Court Judges serving in Onondaga County and County Court Judges serving in Albany County has been upheld (*Burke v. Crosson*, 213 AD2d 963 [4th Dept., 1995]), while a similar disparity between County Court Judges serving in Monroe County and County Court Judges serving in Albany County has been held

to violate plaintiffs' equal protection rights (*Barr v Crosson*, 236 AD2d 875 [4th Dept., 1997]). These results were reached in spite of a holding in *Burke* that differences in cost of living between Monroe and Onondaga Counties were insignificant and that there existed a true unity of judicial interest between Monroe and Onondaga Counties, indistinguishable by separate geographic consideration. Those results, seemingly contradictory, appear to be the result of differences in the quantity and quality of evidence submitted in the two actions.

A literal reading of *Henry* would require plaintiffs in an equal protection case to identify and negate every conceivable State interest that might rationally support the disparity in issue. Such an application of the law would allow the State to rest at the end of plaintiffs' case and then simply identify a speculative explanation for which no evidence had been offered. While the cases cited above have consistently required plaintiffs to sustain the overall burden of proof they have not required plaintiffs to identify and refute every possible explanation prior to a defendant coming forward and providing some evidence of the particular grounds relied upon for the disparity at issue. A showing of a similarity in function, duties and responsibilities, and proof of substantially equal caseloads is sufficient to establish a *prima facie* claim of violation of equal protection (*see, Kendall v Evans*, 126 AD2d 703 [2nd Dept., 1987], aff'd 72 NY2d 963 [1988]). In *Kendall*, plaintiffs' proof of similarity of functions, duties and responsibilities, and that caseloads were substantially the same was held to meet the summary judgment requirement that the moving party's papers establish *prima facie* entitlement to judgment, sufficient to require the defendants to articulate and present some evidence of some State interest that rationally supports the disparate treatment. Similarly, in *Edelstein v Crosson*, 187 AD2d 694 (2nd Dept., 1992), a case involving the pay disparity between the county court judges of Dutchess,

Orange and Rockland Counties and the county court judges of Westchester County, the defendants countered evidence of similar caseload offered by plaintiffs with proof of higher cost of living in Westchester County.

In *Henry v Milonas*, supra, the Court of Appeals held that differences in duties between the multi-bench Judges of Ontario County and the single-bench County, Family and Surrogate's Court Judges of Monroe County precluded a determination of true unity of judicial interest in the compared posts and provided a rational basis for the statutory salary differentials. The *Henry* Court, however, recognized that the State would have had an obligation to produce some evidence of a rational basis for the pay disparity if the plaintiffs had established that their functions, duties and responsibilities were similar and that their caseloads were substantially the same as those of the judges of the comparator court. In fact, one of the grounds stated by the Court of Appeals for its holding in *Henry* is that the State defendants there submitted proof that the median value of homes and per capita were greater in Monroe County than in Ontario County.

For the purpose of determining caseload per judge in a consistent manner total caseload in each county was divided by the number of full time equivalent (FTE) judges assigned to the respective courts to the extent that information could be obtained from the evidence received. For Putnam County the FTE judge number for the years 1986 through 1988 was .98 judge and for subsequent years .80 judge. For Sullivan County the FTE was 1.4 judges for all years. For Monroe County the FTE was 5 judges for all years. For Suffolk County the FTE applied for purposes of this decision was 9 for all years. The Court notes that the only evidence that the FTE for Suffolk County is 9, instead of 10, the actual number of elected judges, related to calendar year 1997. However, plaintiffs' proposed

findings of fact are based upon a FTE of 9 for all years. Use of an FTE of 9 for Suffolk County extends to defendants the most favorable caseload comparisons that can be derived from the evidence received at trial.

Putnam County

The evidence established that the jurisdiction, practice and procedures in Monroe County Family Court are the same as in the Family Court of Putnam County. The average per judge caseload based upon filings and dispositions was substantially greater for Monroe County Family Court than for the judge presiding over Putnam County Family Court for all years for which evidence was received. Also, the population per judge was at all times greater in Monroe County than in Putnam County.

The evidence also established that plaintiffs' functions, duties and responsibilities are substantially equivalent to those of the judges who preside in Putnam County Family Court. To the extent their functions, duties and responsibilities differ, the difference does not provide a rational basis for the pay disparity here in issue. Defendants rely upon the decision in *Henry v Milonas*, supra, to support their claim that the difference in duties between multi-bench judges and single-bench judges, standing alone, provides a rational basis for the pay disparity in issue here. However, the specific holding in *Henry* is that the differences in duties between the multi-bench judges of Ontario County and the single-bench judges who sit in County Court and Family Court in Monroe County provide a rational basis for paying the single-bench judges more than the multi-bench judges. The equal protection clause of the Fourteenth Amendment denies to States the power to legislate that different treatment be accorded to persons placed in different classes on the basis of criteria wholly unrelated to the

purpose of the statute (*see, Reed v Reed,* supra). A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced will be treated alike (*Royster Guano Co., v Virginia* 253 U.S. 412, 415 [1920]). The requirement that persons similarly circumstanced be treated alike precludes using the difference in duties between multi-bench judges and single-bench judges as a rational basis for paying single-bench judges more than multi-bench judges in *Henry,* and at the same time as a rational basis for paying the multi-bench judges of Putnam County more than the single-bench plaintiffs in this action. The differences here are the exact opposite of the differences found to provide a rational basis for the pay disparity in *Henry*. Consistent application of the *Henry* ruling, that the difference between the duties of multi-bench judges and single-bench judges provides a rational basis for paying single-bench judges more, precludes a finding here that the differences in duties between the plaintiffs and the judges who preside over Family Court in Putnam County provides a rational basis for the pay disparity here in issue.

The defendants have not asserted that the cost of living is greater in Putnam County than in Monroe County. They offered no evidence as to comparative costs of housing or living in the two counties.

The Putnam County Judges who preside over Family Court in Putnam County receive the same rate of pay while sitting in Family Court as they do while sitting in the other courts of their multi-bench. The evidence before this Court does not establish any rational basis for paying the judges who preside over Family Court in Putnam County at a rate higher that the rate received by plaintiffs. Consequently, the existing pay disparity between plaintiffs and the judges who preside

over Family Court in Putnam County violates plaintiffs' right to equal protection under the State and Federal Constitutions.

Sullivan County

The evidence established that the jurisdiction, practice and procedures in Monroe County Family Court are the same as in the Sullivan County Family Court and that the functions, duties and responsibilities of plaintiffs are substantially the same as those of Sullivan County Family Court Judges. Further, the caseload per full time equivalent (FTE) was substantially equivalent to or greater in Monroe County than in Sullivan County for all years for which evidence was received. The population per Family Court Judge is substantially greater in Monroe County than in Sullivan County. Additionally, the average cost of single family houses is greater in Monroe County than in Sullivan County. The defendants did not assert that the overall cost of living was greater in Sullivan County than in Monroe County and offered no evidence from which the Court could reach that conclusion.

The trial record does not reveal any rational basis for the pay disparity between plaintiffs and the Family Court Judges of Sullivan County. Consequently, the existing pay disparity violates plaintiffs' right to equal protection under the State and Federal Constitutions.

Suffolk County

The evidence established that the jurisdiction, practice and procedures in Monroe County Family Court are the same as in the Suffolk County Family Court and that the functions, duties and responsibilities of plaintiffs are substantially the same as those of Suffolk County Family Court Judges.

In 1991 and prior years the caseload per family court judge was substantially higher in Suffolk County than in Monroe County. For 1992 and all subsequent years the caseload per judge has been substantially the same or greater in Monroe County than in Suffolk County. The population per family court judge is greater in Monroe County than in Suffolk county.

The defendants failed to offer any evidence that would support a finding that the cost of living is greater in Suffolk County than in Monroe County. In fact they failed to produce any evidence of year-to-year comparisons of cost of living or any other relevant factors that would justify the pay disparity in issue here. Defendants' expert, Mitchell Horwitz, Ph.D., expressed substantial reservations relative to his opinion, which was based solely upon defendants' Exhibit B, that the cost of living was greater in Suffolk County than in Monroe County. Exhibit B is a compilation of cost of living for a mid-management lifestyle in various cities or metropolitan areas around the country including several communities in New York State prepared by the American Chamber of Commerce Researchers Association (ACCRA). Dr. Horwitz's testimony was essentially worthless for purposes of establishing a cost of living differential between Monroe and Suffolk Counties. He testified that the community designated "Rochester" on defendants' Exhibit B was in fact Monroe County and his testimony assumed that the "Rochester" data, in fact, represented Monroe County cost of living information. That assumption was false as acknowledged by defendants' attorney, William D. Lonergan, Esq., in a letter to the Court dated October 15, 1997. In that letter Mr. Lonergan acknowledged that the Rochester metropolitan statistical area (MSA) included five counties (Livingston, Monroe, Ontario, Orleans and Wayne) for years using the 1980 federal census and a sixth county (Genesee) for years using the 1990 census.

The only years for which defendants' Exhibit B contained "Rochester" data were 1992, 1993, 1994, 1995, and 1996, all subsequent to the 1990 census. Consequently, the data relied upon by Dr. Horwitz was for a six-county area that included Monroe County and the five adjoining mostly rural counties of the Rochester MSA. Defendants' failure to produce any comparative cost of living evidence for Monroe County is particularly puzzling to this Court as such evidence was introduced by the State defendants in *Henry v Milonas*, supra, to establish that the median value of homes and per capita income were greater in Monroe County than in Ontario County. Dr. Horwitz's testimony, based as it was on the false assumption that the "Rochester" MSA included only Monroe County, is totally without weight in support of defendants' claim that the cost of living is greater in Suffolk County than in Monroe County. Consequently, defendants have failed to produce any evidence that the cost of living or any other relevant factor provides a rational basis for the pay disparity here at issue.

The ACCRA data is faulty as a basis for comparing cost of living between Monroe County and Suffolk County for two additional reasons. First, Dr. Horwitz testified that the ACCRA data is used for comparison of costs of living in a given quarter year period. However, there is no quarter for which "Rochester" and "Suffolk" data both appear. Secondly, there is information for all of Suffolk County alone only in the reports for the fourth quarter of 1986 and the first quarter of 1987. The 1978 report lists information for two Suffolk County communities but not for the whole county. For 1989, 1990, 1991, and part of 1992 there are entries for a "Nassau and Suffolk PMSA," a metropolitan statistical area consisting of Nassau and Suffolk Counties. The two county average of the Nassau-Suffolk MSA is useless for determining cost of living in Suffolk County because there is no evidence, or even any

claim by defendants, that the cost of living in Nassau County is the same as in Suffolk County. Even if the Court were to make the assumption, for which there is no basis in the trial record, that the Nassau-Suffolk PMSA fairly represents the cost of living in Suffolk County and that the Rochester MSA fairly represents the cost of living in Monroe County there is still no basis for comparison as there is no quarterly report on which information for both areas is contained. Similarly there was no evidence that the cost of housing is greater in Suffolk County than in Monroe County. The defendants' failure to produce any evidence of comparable housing costs is the more perplexing because evidence of Monroe County housing costs was introduced at the *Henry* trial and evidence of Suffolk County housing costs was apparently introduced at the *Killeen* trial before Justice Doyle. The Court must infer from defendants' failure to produce such evidence in their possession that it would not have supported their position. I conclude, therefore, that there is no evidence before the Court that the cost of living is greater in Suffolk County than in Monroe County and that there is no evidence of any other rational basis from and after January 1, 1992, for the pay disparity between Family Court Judges in Monroe County and their counterparts in Suffolk County. Consequently the pay disparity between plaintiffs and the Family Court Judges of Suffolk County has violated plaintiffs' rights to equal protection under the State and Federal Constitutions since January 1, 1992.

CONCLUSION

The disparity in salary between plaintiffs and judges serving in Family Court in Sullivan, Putnam and Suffolk Counties violates plaintiffs' right to equal protection of the law. Plaintiffs are awarded judgment for back pay equal to the pay of the higher of Sullivan County Family Court Judges or

Judges serving in Family Court in Putnam County beginning from either October 1, 1978, or the dates of their commencement of service as Family Court Judges in Monroe County, whichever is later, and, for back pay equal to the pay of Suffolk County Family Court Judges beginning from either January 1, 1992, or the dates of their commencement of service as Family Court Judges in Monroe County, whichever is later, with interest at the statutory rate (*see*, CPLR 5004). Defendants are directed henceforth to pay to plaintiffs salaries equal to those of Family Court Judges in Suffolk County and to make payments or contributions to plaintiffs' pensions and other benefits to reflect the increase in salary.

The Court has recently considered the issue of entitlement to prejudgment interest in another action involving judicial pay disparity (*see, Barr v Crosson*, ___ Misc. 2d ___ [Advance Sheet No. 68], Supreme Court, Monroe County, Kehoe, J., decided February 4, 1998) and will follow its decision in that case. Plaintiffs have been paid bi-weekly during the periods of employment at issue here. Their damages occurred on each of the various pay days on which they were underpaid. Calculation of interest on each bi-weekly underpayment would require 26 separate computations each year and would be unnecessarily burdensome. The court has discretion to grant interest upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date (CPLR 5001[b]). The selection of a single intermediate date for prejudgment interest is not appropriate because of the wide variety of dates of service of plaintiffs. In order to fashion a reasonable procedure the Court holds that for purpose of calculation of interest the plaintiffs' claims arose at the end of each year during which they were underpaid. Interest on payments due for 1978 shall accrue from January 1, 1979, and

for each succeeding calendar year from January 1 of the following year.

Submit Order.

Dated: June 30, 1998

s/L. Paul Kehoe
L. Paul Kehoe
Supreme Court Justice

FAMILY COURT
FTE / CASELOAD PER JUDGE FILINGS

	Monroe Family Court (5 Judges)	Putnam Family Court (2* Judges)	Suffolk Family Court (10 Judges)	Sullivan Family Court (1.4 Judges)
1996	5,090	1,604	3,980	3,866
1995	4,597	1,690	3,681	3,566
1994	4,567	1,718	3,486	3,194
1993	4,099	1,840	3,813	3,421
1992	4,157	1,789	3,736	3,749
1991	3,697	1,850	3,642	3,521
1990	3,595	1,822	3,430	3,503
1989	3,270	1,729	3,691	3,000
1988	2,863	1,768	3,717	3,057
1987	2,532	1,663	3,458	2,991
1986	2,758	1,673	3,602	2,880

* For the years 1989-1996, Putnam had 2 Judges each spending 40 percent (.40) of time on Family Court matters (.80 x total filings). For the years 1986-1988, Putnam had 2 Judges each spending 49 percent (.49) of time on Family Court matters (.98 x total filings).

FAMILY COURT
FTE/CASELOAD PER JUDGE DISPOSITIONS

	Monroe Family Court (5 Judges)	Putnam Family Court (2* Judges)	Suffolk Family Court (10 Judges)	Sullivan Family Court (1.4 Judges)
1996	4,976	1,580	4,083	3,861
1995	4,656	1,710	3,747	3,532
1994	4,695	1,773	3,497	3,156
1993	4,052	1,806	3,625	3,396
1992	4,039	1,809	3,666	3,659
1991	3,714	1,795	3,566	3,586
1990	3,219	1,778	3,347	3,406
1989	3,269	1,627	3,542	2,754
1988	2,750	1,252	3,488	2,864
1987	2,591	1,635	3,251	2,700
1986	2,822	1,278	3,707	2,638

* For the years 1989-1996, Putnam had 2 Judges each spending 40 percent (.40) of time on Family Court matters (.80 x total dispositions). For the years 1986-1988, Putnam had 2 Judges each spending 49 percent (.49) of time on Family Court matters (.98 x total dispositions).

Median Selling Price of
1-, 2- and 3-Family Residences
New York State By County ----- 1987-1991

County	January 1987	January 1988	January 1989	January 1990	January 1991
Monroe	74,900	79,000	83,000	84,500	83,000
Sullivan	55,000	70,000	80,000	82,000	75,000

NOTE: Dates given are the midpoints of the years in which the sales occurred.
SOURCE: New York State Board of Equalization and Assessment.
NA Not available.

TABLE I-5
Occupied Housing Units by Tenure and Value, and Vacancy Rates
New York State By County ----- 1980

	Occupied Housing Units	Owner-Occupied		Renter-Occupied		Vacancy Rates	
		Units	Median Value[1]	Units	Median Contract Rent[2]	Homeowner	Rental
Monroe	252,217	159,543	44,000	92,674	211	1.0%	4.8%
Sullivan	23,021	15,700	37,200	7,321	180	3.8	13.3

[1] As specified by owner.

[2] As specified by renter. Contract rent is the monthly rent agreed to, or contracted for, regardless of any furnishings, utilities, or services that may be included.

SOURCE: New York State Department of Economic Development, State Data Center.

TABLE I-5
Housing Units by Type, Tenure and Value, and Vacancy Rates
New York State By County ----- 1990

	Total Housing Units	Occupied Housing Units	Owner-Occupied		Renter-Occupied		Vacancy Rates		Seasonal, Recreational, Occasional, Migratory Use Units
			Units	Median Value[1]	Units	Median Contract Rent[2]	Homeowner	Rental	
Monroe	285,524	271,944	176,927	90,700	95,017	418	1.3	6.0	960
Sullivan	41,814	24,576	16,882	93,400	7,694	390	4.7	13.2	13,202

[1] As specified by owner.

[2] As specified by renter. Contract rent is the monthly rent agreed to, or contracted for, regardless of any furnishings, utilities, or services that may be included.

SOURCE: 1990 Census of Housing, United States Bureau of the Census: material compiled by New York State Department of Economic Development, State Data Center.

Judiciary Law §221-e
Judges' Salaries from 1978-1999

Date	Monroe	Suffolk	Putnam	Sullivan
10/01/78	46,025	48,503	48,765	46,577
04/01/79	46,025	48,503	48,765	46,577
10/01/79	49,247	51,898	52,179	49,837
10/01/80	51,000	54,000	55,000	52,000
01/01/81	53,550	56,700	57,750	54,000
01/01/82	57,298	60,609	61,792	58,422
01/01/85	71,000	74,000	75,000	72,000
10/01/87	86,000	90,000	90,000	87,000
04/01/93	90,450	99,500	94,650	91,500
10/01/93	94,900	104,000	99,300	96,000
04/01/94	99,500	108,500	103,950	100,500
10/01/94	103,800	113,000	108,600	105,000
01/01/99	125,600	136,700	131,400	127,000

ASSOCIATION OF JUDGES OF THE
FAMILY COURT OF THE STATE OF
NEW YORK, INC.

May 11, 2001

Hon. Joan S. Kohout
Family Court Judge
313 Hall of Justice
Rochester, New York 14614

Re: Affronti v. Crosson

Dear Judge Kohout:

I understand from your counsel, Robert J. Pearl, that you and your colleagues intend to petition the U.S. Supreme Court for a Writ of Certiorari to challenge the Court of Appeals decision of March 22, 2001 in this case. As President to the Association of Judges of Family Court of the State of New York and representative of our two hundred members, I write in support of that petition and authorize you to append this letter to your petition.

We agree that New York State's system of compensation to the judges of the county level courts is totally irrational. For over twenty years the State has failed to rectify disparities in pay that represent nothing other than historical anomalies established before the State became the common employer of these judges. As you know, New York State compensates its Supreme Court Judges at the same pay rate

without consideration of geographic or cost of living differences, but for county level judges, compensation varies without rhyme or reason, uniform criteria being entirely absent.

This time has come for judicial review on the Federal level to determine whether this arbitrary system violates constitutional guarantees to equal protection of the laws. Moreover, as judges, we are troubled by the Court of Appeals ruling in this case. We sincerely hope that your Petition is granted.

Sincerely,

s/Harold J. Lynch

Honorable Harold J. Lynch
President

HJL/ev

The Surrogate's Association
of the
State of New York

June 4, 2001

Hon. Joan S. Kohout
Family Court Judge
313 Hall of Justice
Rochester, NY 14614

Dear Judge Kohout:

As President of the Surrogate's Association of the State of New York, I am pleased to write to you on behalf of the members of our Association in support of your petition to the United States Supreme Court for a writ of certiorari from the recent Court of Appeals decision in this case.

For many years, New York State's judicial compensation system to the judges of county level courts has been criticized as being irrational and unfair. Although our colleagues in State Supreme Court are properly paid the same salary, irrespective the location of their bench, County level judges are relegated to an unfair schedule of compensation unrelated to any uniform basis for differentiation. This anomalous situation has persisted for over 20 years ever since the State became the employer of county level judges.

We agree that the federal judiciary review is urgently needed to determine whether this arbitrary system violates constitutional guarantees to equal protection of the laws.

We sincerely hope that your petition is granted, at which time, we will plan to submit an Amicus brief in support of your case.

Very truly yours,

s/Alfred J. Weiner

Alfred J. Weiner, President

AJW/srp

COUNTY JUDGES ASSOCIATION
of the
STATE OF NEW YORK

June 18, 2001

Hon. Joan S. Kohout
Family Court Judge
313 Hall of Justice
Rochester, New York 14614

Re: Affronti v. Crosson

Dear Judge Kohout:

I understand from your counsel, Robert J. Pearl, that you and your colleagues intend to petition the U.S. Supreme Court for a Writ of Certiorari to challenge the Court of Appeals decision of March 22, 2001 in this case. As President of the New York State County Court Judges Association and representative of our one hundred plus members, I write in support of that petition and authorize you to append this letter to your petition.

A Resolution of the Association in support was unanimously approved on June 12th at our annual meeting.

We agree that New York State's system of compensation to the Judges of the county level courts is totally irrational. For over twenty years the State has failed to rectify disparities in pay that represent nothing other than historical anomalies established before the State became the common employer of these judges. As you know, New York State

compensates its Supreme Court Judges at the same pay rate without consideration of geographic or cost of living differences, but for uniform criteria being entirely absent.

The time has come for judicial review on the Federal level to determine whether this arbitrary system violates constitutional guarantees to equal protection of the laws. Moreover, as judges, we are troubled by the Court of Appeals ruling in this case which effectively eviscerates equal protection rights in New York. More than likely, litigants from this state will need to resort to the Federal Courts to seek redress for unconstitutional deprivations of this kind if this decision stands.

We sincerely hope that your Petition is granted, at which time we plan to submit an Amicus brief in support of your cause.

Sincerely,

s/Eugene L. Nicandri

Eugene L. Nicandri
President

ELN:jmb